

**REDACTED – FOR PUBLIC INSPECTION**

September 12, 2005

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, NW  
Washington, DC 20554

Dear Ms. Dortch:

**Re:** Petition of Qwest Corporation for Forbearance Pursuant to  
47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical  
Area, WC Docket No. 04-223

McLeodUSA Telecommunications Services, Inc., Mpower Communications Corp., and Pac-West Telecomm, Inc. provide these additional comments concerning Qwest's request that the Commission forbear from application to Qwest in the Omaha MSA of key interconnection, unbundling, and other obligations applicable to ILECs under Section 251(c) and 271 of the Act.

**The Commission Must Separately Evaluate Forbearance for Each Market Segment**

Qwest requests sweeping regulatory relief based on the assertion that it is nondominant in provision of retail telecommunications services in the Omaha MSA. However, the Omaha MSA is composed of distinct market segments which may have varying degrees of competition. The Commission has previously found that:

“[b]ecause carriers' impairment could vary by customer class, we are obligated to determine which customers could not be served by carriers without the UNEs in question, and, where practical, require unbundling only for those customers. We also find that distinguishing customers by class is administratively practical in our analysis for many of the network facilities.”<sup>1</sup>

---

<sup>1</sup> *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313 and CC Docket No. 01-338, F.C.C. 04-290 (rel. Feb. 4, 2005) (“*Triennial Review Remand Order*” or “*TRRO*”), para. 125.

The Commission has also found “that distinguishing customers by type is also consistent with our approach in merger orders, such as the *Bell Atlantic/NYNEX Merger Order*, the *SBC/Ameritech Merger Order*, and the *WorldCom/MCI Merger Order*.<sup>2</sup> Qwest’s petition is totally deficient in this regard because it ignores, and fails to present, any analysis of separate markets in Omaha. Therefore, the Commission may not grant the sweeping requested relief based on Qwest’s equally broad assertions of retail competition in the Omaha MSA. Rather, the Commission must evaluate the forbearance criteria with respect to each telecommunications market in Omaha. The Commission may, and should, deny the Petition because Qwest has not adequately differentiated relevant markets.

### **There Is No Wholesale Competition in Omaha**

The Commission must first consider the market for wholesale services, either as a separate market or as a critical element supporting retail markets. As stated by the Iowa Utilities Board “[r]egardless of the competitor, all are dependent upon Qwest to furnish wholesale facilities or services” and “without the availability of the various wholesale elements, competitors would be unable to furnish a finished retail service or products for their customers.”<sup>3</sup> Significantly, Qwest in this proceeding dwells at length on the existence of retail competition but fails to present any evidence that Qwest is not essentially the only wholesale provider in Omaha. And, based on information submitted by Qwest, CLECs are impaired under the Commission’s rules adopted in the *TRRO* without access to UNEs everywhere in Omaha except for transport from one wire center.<sup>4</sup> Even Cox Communications, Inc. (“Cox”) takes advantage of the UNE, interconnection and the other obligations that Qwest wants to eliminate. Nor is it any answer concerning UNEs that CLECs could purchase special access since the Commission has determined that the availability of special access does not eliminate impairment.<sup>5</sup> In short, Qwest is essentially the only wholesale provider of essential loop and transport network elements to competitors. Rather than promoting competition, granting the requested relief with respect to the wholesale market would permit Qwest to harm competition by discriminating in provision of interconnection and collocation, and by raising prices. Therefore, the Commission must deny the requested forbearance with respect to the wholesale market because it could not conclude that it would serve the public interest or “promote competitive market conditions” or “enhance competition among providers of telecommunications services” as required under the statutory forbearance standards.<sup>6</sup>

---

<sup>2</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, para. 126 (2003), (“TRO”), corrected by Errata, 18 FCC Rcd 19020 (2003, vacated and remanded in part, affirmed in part, *United States Telecom Ass’n v. FCC*, 359 F. 3d 554 (D.C. Cir 2004) cert. denied, 125 S. Ct. 313, 316, 345 (2004).

<sup>3</sup> Additional Comments of the Iowa Utilities Board, WC Docket No. 04-223, January 13, 2005, at 3.

<sup>4</sup> Letter from Cronan O’Connell, Qwest, to Thomas Navin, Chief, Wireline Competition Bureau, WCB Docket No. 04-313, July 8, 2005.

<sup>5</sup> *TRRO* para. 46.

<sup>6</sup> 47 U.S.C. Sec. 160(b).

## **There Is No Basis for Forbearance in Retail Markets**

The Commission has previously identified two retail market segments in connection with CLECs' ability to provide competitive service: the mass market, comprised "primarily of residential and similar, very small, business users of analog POTS," and the enterprise market, described as "a business customer market of typically medium to large businesses with a high demand for a variety of sophisticated telecommunications services."<sup>7</sup> Accordingly, the Commission must conduct a separate forbearance analysis for at least these retail market segments.

A Duopoly in the Mass Market Is Insufficient to Justify Forbearance. Assuming that the Commission were to conclude that Qwest is nondominant to some extent in the provision of retail services to mass market customers in Omaha, this would not justify forbearance because the record shows that there is at best a duopoly of facilities-based last mile carriers in Omaha – Qwest and Cox. Various commenters have already explained in the record that intermodal competition is not yet sufficiently developed to provide alternatives to wired telephone services.<sup>8</sup> The Commission has found that "no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market."<sup>9</sup>

And, the Commission has determined that a duopoly is insufficient to protect consumers. The Commission has clearly articulated a policy that three or more providers owning their own facilities is a prerequisite before a market can be viewed as sufficiently competitive so that the Commission can remove regulatory safeguards. In its order that effectively derailed the proposed merger between the two rival satellite television firms, the Commission stated "existing antitrust doctrine suggests that a merger to duopoly ... faces a strong presumption of illegality."<sup>10</sup> Similarly in the context of its Media Ownership proceeding the Commission articulated that "economic theory and empirical studies" show that "five or more relatively equally size firms" are necessary to achieve a "level of market performance comparable to a fragmented, structurally competitive market."<sup>11</sup>

Therefore, with respect to the mass market the Commission may not make the requisite finding under Section 10(a)(2) of the Act that enforcement of unbundling and other obligations is unnecessary to protect consumers because absent interconnection, access to UNEs, and collocation on reasonable terms and conditions CLECs will be unable to compete in Omaha and therefore unable to ameliorate the harmful effects of duopoly in Omaha.

---

<sup>7</sup> TRO para. 197, n. 624. The Commission should limit the mass market essentially to the residential and home office market.

<sup>8</sup> Opposition of Comptel/Ascent, August 24, 2004, p. 15; Opposition of AT&T Corp., p. 13 – 22.

<sup>9</sup> TRRO para. 233.

<sup>10</sup> *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee*, CS Docket No. 01-348, Hearing Designation and Order, FCC 02-284, 17 FCC Rcd 20559, 20605, para. 103 ("EchoStar Merger Order").

<sup>11</sup> 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 FCC Rcd 13620, 13731 ¶ 289 (2003).

There is Insufficient Competition in the Enterprise Market to Permit Forbearance. Cox states that it has only [REDACTED] of the DS1 and above enterprise market in the portions of the Omaha MSA that it serves.<sup>12</sup> Even this figure is likely overstated, however, because it is apparently based on DS1 equivalents. Using DS1 equivalents very likely seriously overstates Cox's enterprise market share because only a few large customers could account for the bulk of service provided, based on DS1 equivalents. Thus, this [REDACTED] market share could represent relatively few customers. This possibility is reinforced since Cox states that it does not track the number of access lines it serves.<sup>13</sup> And, it is not likely that Cox provides any significant service to business customers below the DS1 level. As the Commission has stated:

...the businesses that cable companies serve, or are likely to serve, are home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities. In addition, the record suggests that where cable companies do provide service to business customers, they provide cable modem service, rather than service that is comparable to service provided over high-capacity loops.<sup>14</sup>

Further, other intermodal competitors have little or no presence in the enterprise market.

CLECs compete in the enterprise market in Omaha. The IUB has stated in this proceeding that Qwest maintains only a slight majority of connections in the business retail market.<sup>15</sup> However, as noted, the IUB also found that "[r]egardless of the competitor, all are dependent upon Qwest to furnish wholesale facilities or services" and that "without the availability of the various wholesale elements, competitors would be unable to furnish a finished retail service or products for their customers."<sup>16</sup> Although CLECs are competing in the enterprise market in Omaha, they are impaired in their ability to provide service to the enterprise market without access to the interconnection, UNEs, and collocation that Qwest seeks to eliminate. As noted, there is only one wire center in Omaha that meets the new tests for elimination of unbundling for any UNE.<sup>17</sup>

Therefore, although Qwest may only have approximately a slight majority share of the business retail market in Omaha, essentially all of the competition in the enterprise market is dependent on the interconnection, UNE, and collocation obligations that Qwest is asking the Commission to eliminate. If the Commission were to eliminate access to UNEs to serve enterprise customers in Omaha, Qwest would possess about [REDACTED] of the market, permitting it to discriminate and raise prices without the constraining effect of intramodal or significant intermodal competition. Accordingly, as in the wholesale and mass retail markets, the Commission could not make the requisite findings under the statute that the obligations

---

<sup>12</sup> Letter from J.G. Harrington, Counsel to Cox Communications, Inc. to Marlene H. Dortch, WC Docket No. 04-233, August 24, 2005.

<sup>13</sup> Letter from J.G. Harrington, Counsel to Cox Communications, Inc. to Marlene H. Dortch, WC Docket No. 04-233, May 16, 2005, p. 13.

<sup>14</sup> *TRRO* para. 193.

<sup>15</sup> Additional Comments of the Iowa Utilities Board, WC Docket No. 04-223, January 13, 2005, at 3.

<sup>16</sup> *Id.*

<sup>17</sup> Letter from Cronan O'Connell, Qwest, to Thomas Navin, Chief, Wireline Competition Bureau, WCB Docket No. 04-313, July 8, 2005.

Qwest wants to eliminate are unnecessary to protect customers in the enterprise market or the public interest or that forbearance would promote competitive market conditions.

### **The Requested Relief Would Harm Competition in Omaha**

Commenters stress that the proposed forbearance would cause a number of immediate, serious harms to competitors. If Qwest were relieved of the obligation under Section 251(c)(2) to provide nondiscriminatory interconnection to CLECs, it would be able to harm CLECs currently in the market by raising prices, and providing poor quality interconnection. Qwest would also be able to completely foreclose new competitive entry by denying reasonable and nondiscriminatory interconnection to new entrants. In short, the offering of interconnection on nondiscriminatory and reasonable terms and conditions remains essential to the development of competition. This will continue to be the case as the network evolves toward an exclusive IP-enabled platform.

As already discussed, under the Commission's determinations in the *TRRO*, CLECs are impaired nearly everywhere in Omaha without access to UNEs and would by definition, under the Commission's rules, be harmed in their ability to provide competitive service if UNEs become unavailable. CLECs similarly use collocation obtained from ILECs under Section 251(c)(6) and would be harmed without it.

McLeodUSA, for example, serves all of its customers in Omaha using UNEs, has 11 collocations there, and has otherwise invested millions of dollars in facilities in Omaha. McLeodUSA and other CLECs in Omaha would be seriously and concretely harmed by the proposed relief, which, in turn, would expose their customers to significant disruptions. A Commission determination, therefore, that Qwest is no longer obligated to provide any of these essential facilities under Section 251(c) and services on just and reasonable terms and conditions would have a potentially devastating impact on CLECs. McLeodUSA's significant and large facilities-based UNE-L investment in Omaha would be stranded, thereby forcing all current McLeodUSA customers back to Qwest.

More broadly, as CompTel has recently pointed out, the proposed forbearance would usher in a new era of regulatory uncertainty as BOCs would inevitably file numerous "me too" petitions seeking to ever expand the parameters of unbundling relief.<sup>18</sup> Also, as commenters have already contended, unbundling relief should be addressed in broad rulemakings examining that issue, not on an *ad hoc* basis as requested by Qwest.<sup>19</sup> The Commission has established the biennial review process as the vehicle for considering future UNE relief.<sup>20</sup> The Commission should, therefore, deny the petition and direct Qwest to file its request in the next biennial review with proposed rules that appropriately differentiate and address relevant markets, unlike its current Petition. Of course, if the Commission were in this proceeding to grant any of the requested relief, such as UNE relief for some market segments in Omaha, an appropriate

---

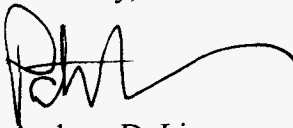
<sup>18</sup> Letter to Marlene H. Dortch, Secretary, from Jason Oxman, CompTel, WC Docket No. 04-223, September 9, 2005.

<sup>19</sup> Comments of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223, filed August 24, 2004, p. 12.

<sup>20</sup> *TRO* para. 710.

transition period would be necessary in which current terms and conditions would continue for two years.

Sincerely,

A handwritten signature in black ink, appearing to be 'ADL' with a long, sweeping horizontal line extending to the right.

Andrew D. Lipman  
Richard M. Rindler  
Patrick J. Donovan

Counsel for  
McLeodUSA Telecommunications Services, Inc.  
MPower Communications Corp.  
Pac-West Telecomm, Inc.

Cc: Dan Gonzalez  
Michelle Carey  
Russell Hanser  
Jessica Rosenworcel  
Scott Bergmann  
Thomas Navin  
Ian Dillner  
Julie Veach  
Jeremy Miller  
Tim Stelzig